Decision

Matter of: Unisys Corporation

File: B-232634

Date: January 25, 1989

DIGEST

1. Protester who criticizes awardee's proposal as deficient has not shown that the proposal was technically unacceptable where the agency identifies where awardee's proposal addressed the items which are the subjects of the protester's criticisms.

2. Allegation that awardee improperly obtained protester's proprietary information by hiring protester's former employee is essentially a matter of dispute between private parties and will not be considered by the General Accounting Office.

DECISION

Unisys Corporation protests the award of a fixed-price contract to Harris Corporation under request for proposals (RFP) No. N00600-88-R-2311, issued by the Naval Regional Contracting Center, Washington, D.C., for implementation of the Naval Integrated Storage Tracking and Retrieval System (NISTARS) at three sites. Unisys contends that the Navy's evaluation of Harris was unreasonable and violated the stated evaluation criteria because it believes Harris cannot perform the contract at the proposed price. Unisys also contends that Harris improperly obtained Unisys proprietary information.

We deny the protest in part and dismiss it in part.

The purpose of the NISTARS contract is to establish a system of overall material control, minimize paperwork in supply warehouses, establish efficient material flow, and reduce the amount of manpower needed to operate warehouses at Naval Supply Centers in Pearl Harbor, Hawaii, Pensacola, Florida, and Puget Sound, Washington, with an optional site at the Marine Corp's Air Station, Cherry Point, North Carolina. The successful offeror is required to provide hardware,

software, training, documentation, maintenance, and other contractor support services for the installed NISTARS. As part of the contract, the Navy will supply as government furnished information (GFI) certain NISTARS software that is being developed by Unisys for the Naval Supply Center, Jacksonville, Florida, under an on-going contract. This includes data base specifications, functional description design, user's manual, computer operator's manual, program maintenance manual, and the source and object codes for the NISTARS software.

Offerors were advised that information in their proposals must be in sufficient depth to enable the government to evaluate the offeror's understanding of and the ability to provide the required hardware, develop required software programs, install, integrate, deliver, and support an operable NISTARS meeting the performance specifications within the specified time frame. A detailed design was not required for the technical proposal; a conceptualization of how the proposed system would operate was considered adequate for proposal evaluation. Among other things, offerors were required to address software modifications showing both the level of effort intended and pricing.

The RFP provided as general evaluation information that it may accept other than the lowest offeror, but that "it is anticipated that award will be made to the lowest priced, technically acceptable, responsible offeror." Technical acceptability of offers was based on meeting the government's minimum needs in three areas: sound technical approach, sound management approach, and compliance with all specifications.

The RFP was sent to 41 potential offerors and Unisys and Harris submitted proposals. Both were originally found by the technical evaluation panel (TEP) to be technically unacceptable, but capable of being made acceptable. After discussions in which the offerors were advised of their respective deficiencies, best and final offers (BAFO) were solicited. The TEP reviewed the BAFOs and determined that both proposals were technically acceptable. Since Harris's price was low at $18,047,597$\underline{1}$/ the Navy awarded it a firm, fixed-price contract on September 8, 1988. After Unisys requested and received a debriefing, it filed a protest with our Office.

Unisys contends that based on its extensive knowledge of NISTARS, the Harris proposal could not meet the Navy's

---

$\underline{1}$/ Unisys' BAFO price was $18,963,000.

requirements; that the Navy violated the evaluation scheme because Harris was not technically acceptable or really the lowest priced offeror since it could not perform the contract at its proposed price; and that Harris had improperly obtained Unisys proprietary information through a former Unisys employee hired by Harris.

After reviewing a redacted copy of the Harris proposal and the agency report, Unisys has made an in-depth critique of Harris' proposal, in which Unisys specifically identifies and discusses the numerous areas where Harris' proposal allegedly did not comply with RFP requirements.2/ Unisys claims that the hardware and software proposed by Harris will be incompatible with the GFI software absent extensive modifications, many of which Harris, in its proposal, has not identified or has proposed not to modify. In this regard, Unisys asserts that the Navy apparently plans to change Harris' contract after award to provide for software modifications that will allow the system to function.

Unisys also claims the proposed hardware configuration for the computer controller for hand-held terminals will not work and that Harris' proposed parallel configuration of printers at certain workstations exceeds the state of the art. With regard to four areas--sorter workstation operation, operator routing instructions, emergency issue packing, and "incompatible" printers--Unisys criticizes Harris for not identifying the necessary software changes to implement these functions and the hardware. Unisys also alleges that Harris failed to explain emergency issue notification; that it had provided only contingency plans for a program generation and check-out facility and that its potential plan to use the Unisys Great Neck facility3/ would be unworkable; that its training information was not sufficiently detailed; and that it failed to provide a conversion and implementation plan as required by the RFP.

2/ As a preliminary matter, contrary to Unisys' assessment of the record, we found it sufficient to support the determination that Harris' proposal was acceptable and to make our review. We were furnished with Harris' proposal and BAFO, the technical evaluations which detailed the general and specific deficiencies in those proposals, and an agency report and supplemental report.

3/ A review of Harris' entire proposal reveals that another facility was proposed as Harris' primary alternative to the Unisys facility and the latter facility was used in the Navy's evaluation.

Further, Unisys notes deficiencies identified by one of the Navy's evaluators--Harris' failure to provide software capable of nonstop programming and checkpointing and failure to mention certain software modifications including modifications to the proposed RABBIT software and to the software for input-output interface between workstations and peripherals--which apparently were not identified to Harris in discussions and thus not corrected or explained by Harris. Unisys claims that this evaluator's contentions were soundly based in that the unmodified RABBIT software will not allow the system to meet RFP requirements.

Finally, Unisys alleges that Harris' management plan is unacceptable since it fails to account for the fact that the GFI, currently being developed by Unisys, will not be finally turned over until 6 months into this contract such that Harris cannot meet the RFP delivery schedule.

The Navy replies that the TEP reviewed Harris' technical approach and approved it as technically acceptable. In its report, the Navy has responded to and identified those portions of the Harris proposal that address the deficiencies alleged by Unisys. The Navy also notes that Harris provided for various software modifications in its proposal.

In its supplemental comments, Unisys continues to disagree with the Navy's explanations and urges that the Navy's acknowledgment that some modifications to the software will be necessary, establishes that the Navy intended to issue contract modifications at the time it awarded the contract.

The Unisys contention that extensive modifications were contemplated when award was made is not supported by the record. The Navy statement that "minor" software modifications are foreseen was specifically contemplated in the RFP, as amended, and provides no support for Unisys' speculation that the Navy, recognizing the need for "extensive" software modifications, nevertheless awarded Harris the contract intending to modify it. While an agency may not award a contract with the intent to modify it, American Television Systems, B-220087.3, June 19, 1986, 86-1 CPD ¶ 562, speculative allegations of an intent to modify are insufficient to form the basis of a protest. See Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275. Also, the Navy's acknowledgment of its responsibilities under the government property and "changes" clauses of the contract if the GFI is not operable or in accordance with the RFP is not evidence that extensive contract modifications were contemplated when award was made.

Unisys has provided detailed technical arguments why the Harris proposal was unacceptable. However, it is not the function of our Office to evaluate proposals de novo. Rather, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria, since the determination of the relative merits of competing proposals, particularly with regard to technical considerations is primarily a matter of administrative discretion. Systems & Processes Engineering Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ 478. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Id., citing Instruments & Controls Service Co., B-230799, June 6, 1988, 88-1 CPD ¶ 531.

While Unisys has provided detailed technical arguments why it believes Harris cannot meet RFP requirements, the Navy has generally responded to each concern. Based on our review of the record, we are not persuaded that the agency determination that Harris' proposal is acceptable is unreasonable. An underlying theme of Unisys' protest is that since it is developing the NISTARS software on its own equipment, it does not believe it possible that any competitor could economically propose its own system utilizing this software. However, the Navy has persuasively responded that the RFP contemplated that other vendors would be able to utilize the NISTARS software; that was a purpose of the Navy's contract with Unisys to supply this software, including source and object codes. The fact that Unisys may be more familiar with the NISTARS software does not establish the exclusive capability that Unisys apparently believes it has.

We will not discuss all of Unisys' numerous technical criticisms of Harris' proposal, inasmuch as the Navy has generally identified where Harris' proposal has addressed those subjects and many of the other criticisms concern Harris' ability to do what it said it could do in its proposal.[4] We will only specifically discuss those remaining allegations that cannot be simply answered by the Navy's references to Harris' proposal.

The fact that one Navy evaluator on the TEP identified areas perceived as deficient does not convince us that the

---

[4] As discussed below, we will not review an agency determination that an offeror is responsible, that is, that it will perform in accordance with the contract, absent a showing of fraud or bad faith.

TEP as a whole or the contracting officer as source
selection official believed that these were unresolved
deficiencies.5/ It is not unusual for individual evaluators
to have disparate, subjective judgments, which are subject
to reasonable differences of opinion. See, e.g., Mounts
Engineering, 65 Comp. Gen. 476 (1986), 86-1 CPD ¶ 358. As
such, the negative comments of one evaluator are not
controlling for award, since the ratings of technical
proposals are useful only as guides to intelligent decision
making. Ferguson-Williams, Inc., B-231827, Oct. 12, 1988,
88-2 CPD ¶ 344. Here, Unisys has not clearly demonstrated
that the one evaluator's concerns were soundly based or that
the agency determination that Harris' proposed software
could successfully accomplish the RFP requirements was
unreasonable.

With regard to Unisys' allegation that the hardware
configuration for the hand-held terminal workstations
require a keyboard and monitor to operate properly, the Navy
responds in its supplemental report, erroneously, that
Harris intended to furnish those items with those work-
stations. Unisys is correct that Harris specifically
proposed not to furnish a keyboard and monitor. However,
our review of the unredacted Harris proposal and Unisys'
arguments do not convince us that Harris' system will not
operate in accordance with the RFP. In any case, Unisys has
not established that, to the extent additional hardware may
be necessary to implement Harris' proposal, this is a sig-
nificant change to Harris' system or that it will be the
responsibility of the Navy, since Harris is required to meet
the statement of work requirements.

With regard to whether Harris was responsive to the
emergency issue notification requirement, we note that the
Harris proposal does address this aspect of the system. The
Navy also explains that this aspect is covered by the RFP
statement: "NISTARS will provide immediate notification for
an emergency issue required from nonmechanized area." While
Unisys argues that NISTARS does not have this capability,
the Navy is satisfied that NISTARS as implemented by Harris
on this contract will have this capability; Unisys has not
shown that this is not the case.

With regard to Harris' exceeding the state of the art in
its parallel configuration of three printers, the Navy has
explained that Harris intends to connect one of the printers

_____

5/ Indeed, the Navy report takes issue with these particular
evaluator concerns and identifies where Harris' proposal
addresses those concerns.

6   B-232634

to a serial port. While Unisys' redacted copy of Harris' proposal did not show any reference to the serial ports, our copy of Harris' proposal does provide for such ports at the relevant workstations. Thus, it appears that Harris will be able to utilize its printers without exceeding the state of the art.

Unisys claims that Harris' management plan is defective in that Harris' delivery schedule is unrealistic. Unisys explains that since Harris has only 365 days from contract award to complete the first site installation, and Unisys is not required to deliver the GFI software to the Navy until January 1989, Harris will only have 6 months to make necessary modifications to implement the system. The Navy replies that Harris will have access to the preliminary GFI software documents which will allow it to work on the system prior to delivery of the final software. Unisys disagree and contends that such access will be insufficient to allow Harris to complete the work in a timely fashion. We find that this allegation of Unisys, as well as many of its other allegations, essentially question Harris' responsibility, that is, whether it can perform in accordance with the contract. The Navy affirmatively determined Harris to be responsible and where, as here, there is no showing of bad faith or fraud, we will not review that determination. See Nationwide Glove Co., Inc., B-229690, Dec. 23, 1987, 67 Comp. Gen. ____, 87-2 CPD ¶ 624; 4 C.F.R. § 21.3(m)(5) 1988.

With regard to Unisys' contentions that Harris cannot perform at its proposed price, this also concerns Harris' responsibility. In any case, we have consistently recognized that in a firm, fixed-price contract, the risk of cost overrun falls on the contractor, not the government. Supreme Automation Corp.; Clay Bernard Systems International, B-224158, B-224158.2, Jan. 23, 1987, 87-1 CPD ¶ 83. Thus, we do not agree that the Navy violated the RFP's evaluation criteria.

Finally, Unisys claims that Harris has improperly obtained proprietary information through a former Unisys employee hired by Harris. Unisys has alleged that various aspects of the Harris proposal reflect the release of proprietary information and has submitted an affidavit to support its contentions. The Navy has explained that Harris was able to obtain all the alleged proprietary information through legitimate avenues and has submitted an affidavit from the former Unisys employee denying the release of proprietary information. Since the government took no part in the alleged acts of that employee, this matter essentially concerns a dispute between private parties which this Office

will not adjudicate in the context of a bid protest. <u>See</u>
<u>Meldick Services, Inc.</u>, B-231072, May 3, 1988, 88-1 CPD
¶ 433.

Accordingly, the protest is denied in part and dismissed in
part. In view of this result, the protester's claim for the
costs of filing and pursuing the protest are denied. <u>See</u>
4 C.F.R. § 21.6(d).

James F. Hinchman
General Counsel